IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORIGINAL SIDE

WRIT PETITION NO.605 OF 2006

M/s.Swam Mills Ltd., a company
incorporated under the Companies
Act, 1956 and having its Registered
Office at 15, Tokersey Jivraj Road,
Sewree, Mumbai 400 015. Petitioners

vs.

1. The Union of India,
Ministry of Finance, Law &
Justice, Aayakar Bhavan, New
Marine Lines, Mumbai 400 020.

2. The Commissioner of Central
Excise, Mumbai-II,
Commissionerate, being the
Designated Authority, under
Kar Vivad Samadhan Scheme, 1998,
formed under the Finance Act, 1998
& having his office at Piramal
Chambers, Jijibhoi Lane, Parel,
Mumbai 400 012.

3. The Superintendent of Central
Excise, Range-05,
Chamber-II Division, Mumbai-II,
and having his office at C/o.Swam
Mills Ltd., New Mill Road,
Kurla(W), Mumbai 400 070. Respondents

Mr.M.H.Patil with Ms.Aparna Hirandagi i/b.Mr.M.H.Patil
for the petitioners.

Mr.S.S.Pakake with Mr.Y.R.Mishra for the respondents.

CORAM : R. M. LODHA &
J. P. DEVADHAR,JJ.

DATED : 28th April, 2006

ORAL JUDGMENT (Per R.M.Lodha,J.)

The petitioners are a composite Textile Mill engaged in manufacture of cotton yarn, man-made yarn, cotton fabrics and man-made fabrics as well as the

processing amongst other activities. For the period from October, 1994 to February, 1997, the petitioners were served with 14 Show Cause Notices for recovery of differential duty of approximately Rs.50 lakhs. The said show cause notices were adjudicated by the Assistant Commissioner of Central Excise, Mumbai-II vide Order-in-original No.781/398/97 to 794/411/97 dated 12th November, 1997, confirming the demands covered thereunder along with interest. The Assistant Commissioner of Central Excise also imposed penalty of Rs.5,000/-. There being incorrect computation, he directed the Range Superintendent to verify figures and work out the fresh demand. The Range Superintendent re-worked the duty amount of Rs.9,40,753/- and issued a demand notice on 18th May, 1998 requiring the petitioners to pay the said amount along with penalty of Rs.5,000/-.

2. Dissatisfied with the order-in-original dated 12th November, 1997 passed by the Assistant Commissioner of Central Excise and the order of Range Superintendent dated 18th May, 1998, the petitioners preferred appeal before the Commissioner of Central Excise (Appeals) on 2nd September, 1998 along with stay application. The Commissioner of Central Excise (Appeals) vide order dated 28th December, 1998 asked the petitioners to deposit the entire amount of duty and penalty within

four weeks from the date of the order.

3. Finance (No.2) Act, 1998, came out with Scheme known as "Kar Vivad Samadhan Scheme, 1998" (for short, ‘KVSS’). The said scheme provided for settling the tax arrear by paying 50% of the disputed tax arrear. Under the KVSS, the Commissioner of Central Excise is said to have been appointed as Designated Authority. The scheme was operative from 1st September, 1998 to 31st January, 1999. The petitioners filed declaration under Section 89 of the Finance Act, 1998 before the Commissioner of Central Excise on 31st December, 1998.

4. The aforesaid declaration filed by the petitioners came to be rejected by the Designated Authority vide his order dated 25th February, 1999 on the ground that appeal was filed by the petitioners before the Commissioner of Central Excise (Appeals) after the limitation for filing the appeal had already expired and that delay in filing the appeal was not condoned by the Commissioner of Central Excise (Appeals).

5. Aggrieved by the order in appeal dated 25th February, 1999, the petitioners preferred appeal before the Customs, Excise and Gold (Control) Appellate Tribunal, West Regional Bench, Mumbai (for short, ‘the Tribunal’).

6. The Tribunal vide its order dated 29th November, 1999 held that the appeal preferred by the petitioners before the Commissioner (Appeals) was within time and, accordingly, set aside the order of the Commissioner (Appeals) and remanded the matter back to him for fresh disposal in accordance with law.

7. On remand, the Commissioner (Appeals) vide order dated 29th June, 2001 upheld the order-in-original dated 12th November, 1997.

8. Going little backwards, it may be noticed here that after the Tribunal passed the order on 29th November, 1999 holding that the appeal preferred by the petitioners before the Commissioner (Appeals) was within time, the petitioners approached the Designated Authority vide their letter dated 24th April, 2001 for reconsideration of the earlier order dated 25th February, 1999 and give the petitioners the benefit of KVSS in the matter of their application filed under Section 89 of the KVSS on 28th January, 1999.

9. The petitioners were informed on 18th January, 2002 by the Superintendent of Central Excise, Range II that their application under Section 89 of the KVSS was re-examined by the Chief Commissioner's office, Mumbai

and since the KVSS no longer exists, the question of accepting their application does not arise.

10. The petitioners then made an application dated 5th February, 2002 to the Chief Commissioner of Central Excise with a request for direction to he Commissioner concerned to look into the petitioners request for KVSS.

11. As the order-in-original dated 12th November 1997/18th May, 1998 had attained finality on dismissal of the petitioners appeal by the Commissioner (Appeals) on 29th June, 2001, the said order was enforced and the petitioners deposited the entire duty and penalty on 7th October, 2004.

12. The Office of Superintendent of Central Excise vide letter dated 3rd November, 2004 asked the petitioners to pay the interest of Rs.11,58,647/- under Section 11AA of the Central Excise Act, 1944 for delayed payment of duty. By subsequent letter dated 22nd November, 2004 the petitioners were again called upon to pay the interest of Rs.11,58,647/- failing which they were informed that recovery of Government dues shall be made under Section 142 of the Customs Act, 1962.

13. Despite repeated letters when the petitioners failed to pay interest amount of Rs.11,58,647/-, the

Superintendent of Central Excise vide letter dated 29th September, 2005 again called upon the petitioners to pay the interest (Government dues) immediately. It was thereafter that the petitioners on 10th October, 2005 sent a letter to the Commissioner of Central Excise for reconsideration of the matter.

14. The Commissioner of Central Excise vide letter dated 19th October, 2005 informed the petitioners that benefit of KVSS cannot be extended to them as the scheme is no longer in existence. It is then that the petitioners approached this Court by filing writ petition. The petitioners have challenged principally the order dated 25th February, 1999 (Exhibit "E") passed by the Designated Authority. They have prayed for direction to the respondents to accept the petitioners declaration dated 31st December, 1998 made under Section 89 of Finance Act, 1998 in respect of KVSS and restrain the respondents from recovery of interest amount of Rs.11,58,467/- as per the final demand dated 7th December, 2005.

15. At the motion hearing stage, on prima facie consideration of the matter, we observed that the rejection of the declaration made by the petitioners under KVSS by the Designated Authority vide order dated 25th February, 1999 appeared to be erroneous and,

therefore, we issued rule and made it returnable after four weeks.

16. The revenue has filed the return in response to the writ petition and denied the petitioners claim. The stand of the revenue is that the petitioners have already paid the Government dues of Rs.9,40,753/- (on 7th October, 2004) much before the writ petition was filed. It was when the respondent no.2 asked the petitioners to pay the interest under Section 11AA of the Central Excise Act, 1944, the present writ petition has been filed on 4th March, 2006 challenging the order dated 25th February, 1999 passed by the Designated Authority. The revenue says that the writ petition is misconceived and liable to be dismissed.

17. The counsel for the petitioners strenuously urged that the Designated Authority seriously erred in rejecting the declaration made under KVSS on the ground that the appeal preferred by the petitioners on 2nd September, 1998 before the Commissioner (Appeals) from the order-in-original dated 12th November, 1997/18th May, 1998 was time barred and, therefore, it cannot be said that any appeal was pending under Section 95(ii)(c) of KVSS, 1998. He would submit that the appeal dated 2nd September, 1998 from the order-in-original dated 12th November, 1997/15th May, 1998 was in time and has

been held to be so ultimately by the Tribunal and, therefore, the Designated Authority ought to have reconsidered its order dated 25th February, 1999 rejecting the petitioners declaration under KVSS. He submitted that after the decision by the Tribunal, many representations were made to the Designated Authority for reconsideration of the order dated 25th February, 1999, but the said representations were erroneously rejected on the ground that KVSS was no longer in existence and had expired. The counsel relied upon the following judgments:

(i) Sheth Enterprises Pvt.ltd. v. Commissioner of Customs, Kandla, 2000(115) ELT 53;

(ii) Commissioner of Income Tax, Rajkot v. Shatrushailya Digvijaysingh Jadeja, 2005(192) ELT 3;

(iii) Hydromatik Belgaum Pvt.Ltd. vs. Commissioner of Central Excise, Belgaum, 2003 (154) ELT 49;

(iv) Commissioner of Central Excise, Belgaum v. Hydromatic Belgaum Pvt.Ltd., 2005(191) ELT 104 and

(v) Wearwell Tyres & Tubes Industries Pvt.Ltd. v. Commissioner of Customs & Central Excise, Bhopal, 2003 (162) ELT 1167.

18. The legal position in respect of Section 95((i)(c) of Finance (No.2) Act, 1998 - KVSS - is expounded by the Supreme Court recently in the case of Shatrusailya Digvijaysingh Jadeja and, therefore, we do not deem it necessary to refer to the judgments of the High Courts cited by the counsel for the petitioners. In

Shatrusailya Digvijaysingh Jadeja, the question for consideration before the Supreme Court was whether the revenue was right in rejecting the KVSS declarations filed by the assessee on the ground that the assessments had become final in the year 1992-93 (when the assessee's appeals were dismissed for failure to predeposit self-assessed tax) and that the assessee had filed revisions under the income Tax Act and Wealth Tax Act in November/December, 1998 only to obtain the benefit of KVSS, which came into force with effect from 1.9.1998. The contention of the revenue was that the revisions filed by the assessee were time barred and as such they were not "pending" in terms of Section 95(i)(c) of the KVSS. Dealing with the question, the Supreme Court considered the matter thus:

> "10. The basic point which we are required to consider in this case is the meaning of the word "pending" in Section 95(i)(c) of the said Scheme.
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> 11. The object of the scheme was to make an offer by the Government to settle tax arrears locked in litigation at a substantial discount. It provided that any tax arrears could be settled by declaring them and paying the prescribed amount of tax arrears, and it offered benefit and immunities from penalty and prosecution. In several matters, Government found that large number of cases were pending at the recovery stage and, therefore, the Government came out with the said Scheme under which it was able to unlock the frozen assets and recover the tax arrears.
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> 12. In our view, the Scheme was in substance a recovery scheme though it was nomenclatured as a "litigation settlement scheme" and was not similar to the earlier Voluntary

Disclosure Scheme. As stated above, the said Scheme was a complete Code by itself. Its object was to put an end to all pending matters in the form of appeals, reference, revisions and writ petitions under the IT Act,WE Act. Keeping in mind the above object, we have to examine Section 95(i)(c) of the Scheme, which was different from appeals under Section 246, revisions under Section 264, appeals under Section 260A etc. of the I.T.Act and similar provisions under the W.T.Act. Under the I.T.Act, there is a difference between appeals, revisions and references. However, those differences were obliterated and appeals, revisions and references were put on par under Section 95(i)(c) of the Scheme. The object behind Section 95(i)(c) in putting on par appeals, references and revisions was to put an end to litigation in various forms and at various stages under the I.T.Act/Wealth Tax Act and, therefore, the rulings on the scope of appeals and revisions under the I.T.Act or on Voluntary Disclosure Scheme, will not apply to this case.

13. One more aspect needs to be looked into. The Finance (No.2) Act, 1998 introduced a Scheme called Kar Vivad Samadhan Scheme, 1998. It was a recovery scheme. Under the Scheme, the tax arrear had to be outstanding as on 31-3-1998. Under Section 87(f), "disputed tax" was defined to mean total tax determined and payable under the IT Act/Wealth Tax Act in respect of an assessment year but which remained unpaid as on the date of making of the declaration from which TDS, self-assessed tax, advanced tax paid, if any, had to be deducted under Section 90; the DA had to determine the amount payable and for that purpose, he had to determine the tax arrear as well as the disputed amount as defined under Section 87(f). Thus, the DA had to make an assessment of tax arrears, disputed amount and amount payable for each year of assessment; that appeal was barred against the order under Section 90 (see Section 92); that such determination had to be done within 60 days from the receipt of the declaration and based thereon the DA had to issue a certificate. In other words, till the completion of the aforestated exercise, the appellant could not have paid the amount of tax and, therefore, the appellant was not liable to pay interest

as his liability accrued only after the ascertainment of the amount payable under Section 90. In the present matter, that exercise has been completed; that taxes have been recovered by sale of lands; that amounts have been paid pursuant to the determination by the DA, may be under the orders of the High Court and, therefore, we do not wish to reopen the matter.

14. In the case of Dr.Mrs.Renuka Datla (supra), this Court has held on interpretation of Section 95(i)(c) that if the appeal or revision is pending on the date of the filing of the declaration under Section 88 of the Scheme, it is not for the DA to hold that the appeal/revision was 'sham", "ineffective" or "infructuous" as it has.

15. In the case of Raja Kulkarni v. The State of Bombay reported in AIR 1954 SC 73, this Court laid down that when a section contemplates pendency of an appeal, what is required for its application is that an appeal should be pending and in such a case there is no need to introduce the qualification that it should be valid or competent. Whether an appeal is valid or competent is a question entirely for the appellate court before whom the appeal is filed to decide and this determination is possible only after the appeal is heard but there is nothing to prevent a party from filing an appeal which may ultimately be found to be incompetent, e.g., when it is held tobe barred by limitation. From the mere fact that such an appeal is held to be unmaintainable on any ground whatsoever, it does not follow that there was no appeal pending before the Court.

16. To the same effect is the law laid down by the judgment of this Court in the case of Tirupati Balaji Developers(P) Ltd. v. State of Bihar & others reported in (2004) 5 SCC 1, in which it has been held that an appeal does not cease to be an appeal though irregular and incompetent."

19. The Supreme Court ruled that the appeal does not cease to be an appeal if barred by time or otherwise incompetent. It was held that as to whether the

revision was time barred or not is to be considered by revisional court, but Department could not reject the declaration filed by the assessee on the ground that no case was pending.

20. That Section 95(i)(c) and 95(ii)(c) are identical would be clear from the bare text of Section 95 which we reproduce hereunder:

> "**95.** The provisions of this Scheme shall not apply-
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> (i) in respect of tax arrear under any direct tax enactment, -
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> (a) in a case where prosecution for concealment has been instituted on or before the date of filing of the declaration under section 88 under any direct tax enactment in respect of any assessment year, to any tax arrear in respect of such assessment year under such direct tax enactment or in respect of a person who has been convicted for concealment on or before the date of filing the declaration;
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> (b) in a case where an order has been passed by the Settlement Commission under sub-section (4) of Section 245D of the income-tax Act or sub-section (4) of Section 22D of Wealth-tax Act, as the case may be, for any assessment year, to any tax arrear in respect of such assessment year under such direct tax enactment;
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> (c) to a case where no appeal or reference or writ petition is admitted and pending before any appellate authority or High Court or the Supreme Court on the date of filing of declaration or no application for revision is pending

before the Commissioner on the date of filing declaration.

(ii) in respect of tax arrear under any indirect tax enactment-

(a) in a case where prosecution for any offence punishable under any provisions of any indirect tax enactment has been instituted on or before the date of filing of the declaration under section 88, in respect of any tax arrear in respect of such case under such indirect tax enactment;

(b) in a case where show-cause notice or a notice of demand under any indirect tax enactment has not been issued;

(c) in a case where no appeal or reference or writ petition is admitted and pending before any appellate authority or High Court or the Supreme Court or no, application for revision is pending before the Central Government on the date of declaration made under Section 88;

(iii) to any person in respect of whom prosecution for any offence punishable under Chapter IX or Chapter XVII of the Indian Penal Code (45 of 1860), the Foreign Exchange Regulation Act, 1973 (46 of 1973), the Narcotic Drugs and Psychotropic Substances Act, 1985 (61 of 1985), the Terrorists and Disruptive Activities (Prevention) Act, 1987 (28 of 1987), the Prevention of Corruption Act, 1988 (49 of 1988), or for the purpose of enforcement of any civil liability has been instituted on or before the filing of the declaration or such person has been convicted of any such offence punishable under any such enactment;

(iv) to any person in respect of whom an order of detention has been made under the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (52 of 1974):

Provided that -

(a) such order of detention, being an order to which the provisions of section 9 or section 12A of the said Act do not apply, has not been revoked on the report of the Advisory Board under section 8 of the said Act or before the receipt of the report of the Advisory Board; or

(b) such order of detention, being an order to which the provisions of section 9 of the said Act apply, has not been revoked before the expiry of the time for, or on the basis of, the review under subsection (3) of section 9, or on the report of the Advisory Board under section 8, read with sub-section (2) of section 9 of the said Act; or

(c) such order of detention, being an order to which the provisions of section 12A of the said Act apply, has not been revoked before the expiry of the time for, or on the basis of, the first review under sub-section (3) of that section, or on the basis of the report of the Advisory Board under section 8, read with sub-section (6) of section 12A, of the said Act; or

(d) such order of detention has not been set aside by a court of competent jurisdiction;

(v) to any person notified under sub-section (2) of section 3 of the Special Court (Trial of Offences Relating to Transaction in Securities) Act, 1992 (27 of 1992)."

21. Section 95(i) is in respect of tax arrear under any direct tax enactment, while section 95(ii) is in respect of tax arrear under any indirect tax enactment.

22. However, from the facts and circumstances which we indicate hereunder, it would be clearly seen that the judgement of the Supreme Court in the case of Shatrusailya Digvijaysingh Jadeja does not help the case of the petitioners.

23. On 12th November, 1997, the order-in-original came to be passed by the Assistant Commissioner of Central Excise and the computation of duty was reworked by the Range Superintendent on 18th May, 1998. The petitioner filed an appeal against the order-in-original dated 12.11.1997/18.05.1998 before the Commissioner of Central Excise (Appeals) along with the application for waiver of predeposit and the stay. The Commissioner of Central Excise (Appeals) vide interim-order dated 28th December, 1998 directed the petitioners to deposit the entire amount of duty and penalty within four weeks from the date of the order which was never done. KVSS came into effect on 1.9.1998 and was operative until 31.1.1999. The petitioners filed the declaration under KVSS (Section 98 of Finance Act, 1998) on 31.12.1998. On 25.2.1999, two orders came to be passed. One by the Commissioner of Central Excise (Appeals) rejecting the petitioners appeal as time barred and the other by the Designated Authority rejecting the declaration filed by the petitioner under Section 89 on the ground that no appeal under Section 95(2)(c) was pending. The

petitioners kept quite and did not take any steps in challenging the order dated 25th February, 1999 passed by the Designated Authority rejecting the declaration filed by the petitioners under KVSS for quite some time, but filed an appeal against the order dated 25th February, 1999 passed by the Commissioner of Central Excise (Appeals) rejecting the petitioners appeal as time barred by filing the appeal before the Tribunal. The Tribunal by its order dated 29th November, 1999 allowed the appeal preferred by the petitioners and set aside the order dated 25th February, 1999 passed by the Commissioner of Central Excise (Appeals) and remanded the matter to Commissioner (Appeals). After remand, the Commissioner (Appeals) upheld the order-in-original dated 12th November, 1997/18th May, 1998 vide order dated 29th June, 2001. The petitioners did not challenge the said order in appeal. Thus the order-in-original dated 12th November, 1997/18th May, 1998 attained finality and in enforcement of the said order, the duty and penalty was paid by the petitioners on 7th October, 2004. It would be, thus, seen that no dispute remained regarding the duty and penalty and the adjudication order dated 12th November, 1997/18th May, 1998 was taken to the logical conclusion. In the meanwhile, it is true that the petitioners on 24th April, 2001 requested the Designated Authority to reconsider the order dated 25th February, 1999, but such

request was wholly misconceived. The petitioners repeated the said request on few more occasions, but these requests were turned down. The counsel for the petitioners sought to urge that the request for reconsideration of the order dated 25th February, 1999 was turned down by the Designated Authority on erroneous premise that KVSS was no longer in existence and had expired on 31st January, 1999. What is important is not the reason of turning down the request made by the petitioners for reconsideration of the order dated 25th February, 1999 but whether such request was legally tenable. If at all the petitioners were aggrieved by the order dated 25th February, 1999 rejecting their declaration under KVSS, they ought to have challenged the same in appropriate proceedings. If appeal was not maintainable from such order then by pursing the remedy under Article 226 of the Constitution of India. But that was never done. It is only after the recovery of duty and penalty was made and the Department asked the petitioners to pay the interest amount of Rs.11,58,647/- under Section 11AA of the Central Excise Act, 1944, the petitioner filed the present petition.

24. The narration of the aforesaid facts would clearly show that the petitioners accepted the order of Commissioner of Central Excise (Appeals) passed on 29th June, 2001 upholding the order-in-original dated 12th

November,1997/18th May, 1998 and ultimately paid due amount of duty and interest on 7th October, 2004. Thus, no dispute in respect of duty and penalty remains.

25. In the circumstances, the petitioners are not entitled to any relief.

26. Writ petition is, accordingly, dismissed with no order as to costs.

(R.M. LODHA,J.)

(J.P. DEVADHAR,J.)